IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 073805

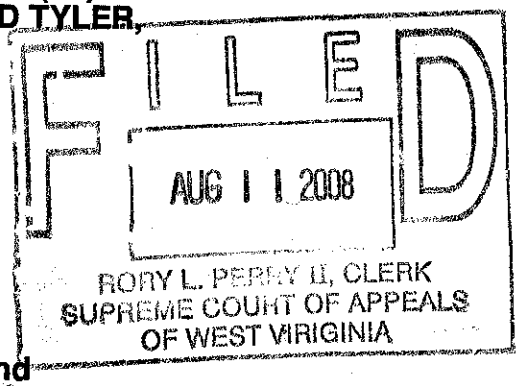
MARLISE TYLER and BRADFORD TYLER as parents and next friends of ARIANNA TYLER, an infant under the age of eighteen (18) and MARLISE TYLER and BRADFORD TYLER, individually,

Appellants,

v.

ARDEN E. FREDEKING, and GEICO INDEMNITY COMPANY,

Appellees.



On Appeal from the Circuit Court of Cabell County
(Honorable John L. Cummings)
Civil Action No. 03-C-811

BRIEF OF APPELLEE, ARDEN E. FREDEKING

Respectfully Submitted,

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I. KIND OF PROCEEDING AND NATURE OF RULING OF LOWER COURT

This appeal comes from the Circuit Court of Cabell County and arises out of a trial on damages incurred as a result of a motor vehicle accident. In the underlying proceeding, the defendants below, the appellants in this proceeding, admitted liability for a motor vehicle accident that occurred on July 22, 2003. The plaintiff below, Arden Fredeking, the appellee in this proceeding, settled her bodily injury claim with the defendants, but was unable to resolve her property damage claim. As such, this case went to trial on December 18 and 19, 2006. Although the trial should have been solely on what amount of damages the plaintiff was entitled to, the trial court permitted the jury to determine ownership based upon the defendants' argument that the plaintiff did not own the motor vehicle she was driving at the time of the accident. Importantly, both Ms. Fredeking and R.R. Fredeking, II, her father who transferred ownership of the motor vehicle to Ms. Fredeking, stated that Ms. Fredeking was the owner of the vehicle. (See, Trial Transcript, p. 11, 121-122,181, 202, 204-206). Although liability was admitted, the jury returned a verdict finding that the plaintiff did not own the motor vehicle in question. (See, Verdict Form).

Following trial, Ms. Fredeking filed a Motion for Judgment as a Matter of Law or in the Alternative for a New Trial, requesting that the trial court set aside the jury's verdict and enter judgment in her favor as the overwhelming evidence at trial unequivocally demonstrated that she was the owner of the motor vehicle. On November 1, 2007, an Order was entered

granting Ms. Fredeking a new trial, finding that the issue of ownership of the vehicle should not have been decided by the jury and further finding that the trial court incorrectly instructed the jury regarding ownership. (See, Order Granting a New Trial).

The defendants have incorrectly alleged that the plaintiff failed to assert that there was any prejudicial error during the trial that affected the outcome. (See, Appellants' Brief, p. 15, filed herein.) As is obvious from the trial court's ruling and the Plaintiff's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial, the plaintiff clearly asserted that there was substantial prejudicial error during the trial which clearly affected the outcome. (See, Plaintiff's, Arden E. Fredeking, Motion for Judgment as a Matter of Law or in the Alternative for New Trial and incorporated Memorandum of Law). The plaintiff specifically asserted that the instructions provided to the jury were incomplete or otherwise improper, a point on which the trial court obviously agreed. (Id. at p. 7 and Order Granting New Trial at p. 2). Furthermore, the plaintiff asserted that the remarks and arguments made by defense counsel during closing were not only prejudicial error but were directly contrary to the lower court's ruling that West Virginia law applied. (See, Plaintiff's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial, p. 10). Although it is irrelevant whether West Virginia law applied to the transaction transferring ownership of the vehicle from Fredeking and Fredeking, LC to Arden E. Fredeking, the arguments counsel made concerning what was required to transfer ownership under Florida law were prejudicial as they were incorrect. This prejudice was exacerbated by the trial court's improper jury instructions. The trial court wisely, and clearly within its discretion, corrected these errors by granting the plaintiff a new

trial.

The defendants rely heavily on the fact that the registration has the name of Fredeking and Fredeking, LC on it and that the plaintiff never transferred the registration into her name. By the defendants' theory, the Fredeking and Fredeking law firm was the owner of the car. However, as was clearly established during trial, the corporation was dissolved prior to transferring the ownership of the vehicle to Ms. Fredeking. (See, Transcript, p. 117-118). It was clear from the testimony of both Ms. Fredeking and her father, R.R. Fredeking, II, that Ms. Fredeking was the owner of the car. (See. Transcript, p. 110-111). The defendants also rely heavily upon the fact that the law firm renewed the registration of the vehicle from 1998-2003. (See, Appellants' Brief, p. 4). The reason it was in the law firm's name was just a result of habit in renewing the registration and having no need to change the registration of record. (See, Transcript, p. 112).

On November 16, 2007, the defendants petitioned this Court for appeal and requested this Court reverse the trial court's Order setting aside the jury verdict and reinstate the verdict. (See, Petitioner's Petition for Appeal and/or For Rid of Prohibition with Oral Argument Request, filed herein). This Court granted the Petition and the present appeal follows. The defendants assert that the jury verdict was correct because "(1) the vehicle was titled in the name of the law firm during the time in which the Plaintiff contends she owned the vehicle; (2) despite language on the title from which the Plaintiff claims she derived her title which required a new title be issued, the Plaintiff never sought to have the title transferred into her

name; and 3) for every year between 1998 and the date of the accident in 2003, the law firm renewed the registration to the vehicle in its name, all with the consent and acquiescence of the plaintiff." (See, Appellants' Brief, p. 5). However, the defendants are making the same mistake they have made throughout these entire proceedings in equating proper registration with ownership. Although the vehicle may have not been properly registered in either West Virginia or Florida, the laws of both states recognize that registration does not equal ownership. When examining the facts with this understanding, it is clear that Arden E. Fredeking was the owner of the motor vehicle in question at the time of the accident.

II. STATEMENT OF FACTS

On or about July 22, 2003, Arden Fredeking was the owner of a 1985 BMW. Ms. Fredeking was operating her vehicle in a northerly direction on 8th Street, at the intersection of 8th Street and Thirteenth Avenue, in Huntington, Cabell County, West Virginia. The defendant, Arianna Tyler, was operating a 1993 Chevrolet Lumina owned by her parents, Marlise Tyler and Bradford Tyler.

Ms. Tyler was operating her vehicle in a southerly direction on 8th Street and Thirteenth Avenue. Ms. Tyler caused her vehicle to make a left turn from 8th Street, southbound, to Thirteenth Avenue, eastbound, into the path of Ms. Fredeking's vehicle, who had the legal right of way, resulting in a collision. The defendants admitted liability for the motor vehicle accident. As liability was not an issue, the only issues in dispute were

ownership and the amount of damages Ms. Fredeking was entitled to as a result of the defendant's negligence.

Thereafter, on December 18th and 19th, 2006, the case was tried before a jury. During trial, Ms. Fredeking presented uncontroverted evidence that the value of the vehicle was Six Thousand Nine Hundred Dollars ($6,900.00). The fact that the vehicle was a total loss was never an issue.

Evidence was presented during trial demonstrating Ms. Fredeking's ownership of her vehicle. Ms. Fredeking's father, R. R. Fredeking II, gave the vehicle to his daughter on her sixteenth (16th) birthday, February 2, 1998. (See, Trial Transcript, pp. 58, 182). Although Mr. Fredeking was a co-owner of the vehicle, Ms. Fredeking drove it almost exclusively, including driving it and using it while in school in New Hampshire, immediately preceding the motor vehicle accident in question. (Id at p. 58,188).

Immediately prior to transferring ownership of the motor vehicle, it was titled in the name of Fredeking & Fredeking Legal Corp., a West Virginia corporation which is now dissolved. (Id. at p. 105, 107, 108). Fredeking and Fredeking LC was dissolved even prior to the transfer of ownership, however, the transfer would still be effective as Mr. Fredeking was the owner of Fredeking and Fredeking LC (Id. at p. 117).

When Mr. Fredeking gave his daughter the car, the title was signed over to Ms. Fredeking and Mr. Fredeking as co-owners. (Id. at p. 109, 111 and Certificate of Title, attached to Appellants' Brief as Exhibit A). Since that time, the title has been secured in a lock box for safekeeping. (See, Trial Transcript, p.111).

Both Mr. Fredeking and Ms. Fredeking testified that the ownership was effectively transferred and they behaved as such. (Id. at p. 11, 121-122, 181, 202, 204-206). Specifically, Mr. Fredeking testified that:

> I gave it to her lock, stock, and barrel. It was her car. My name was on that title only for convenience. She was 16 years old when I signed it over to her. It was Arden's car. She took it to school. The only thing that I did was pay maintenance on it. It was hers to sell. She could have done anything she wanted to do with that vehicle. If she wanted to trade it and she had money for a trade, she could have done that. It was her car exclusively. When you give a child something, it's theirs. It's not mine anymore.

(Id. at p. 121). Also, Ms. Fredeking testified, "Well, I was under the impression that this [the Certificate of Title] - - this did show ownership, just because it says, you know sold and delivered to, you know, Arden Fredeking. My name is on that. Arden Fredeking or R. R. Fredeking. So, I mean, I was under the impression that that was all it needed." (Id. at 203-204).

Additionally, both Ms. Fredeking and her father testified that she drove the car almost exclusively and that she took care of the car, including washing and waxing it. (Id. at p. 58, 63, 188-189). Furthermore, Ruby Robateau, who is an individual who was familiar with the car, stored the car after the accident, and ultimately determined that the car was totaled, testified during trial. (Id. at 124). Mr. Robateau testified that he knew the car belonged to Ms. Fredeking. (Id. at p. 129-130).

It is important to note that the majority of evidence concerning ownership of the car was uncontested at trial. The defendants' theory that Ms. Fredeking did not own the car at the time of the accident is based solely on the fact that she did not register the car in her own name with the State of Florida. There was no evidence presented to contradict the transfer of ownership but only evidence showing Ms. Fredeking did not register the car in her name prior to the accident.

The defendants attempt to confuse the issues in this appeal by suggesting that because the original Complaint listed Fredeking and Fredeking law offices as a plaintiff, and because an attorney who practices with Ms. Fredeking's father represented Ms. Fredeking, that Fredeking and Fredeking law office was the owner of the vehicle. However, the only reason that Fredeking and Fredeking law offices was listed as a plaintiff was because that was the name on the registration. Upon realizing that Fredeking and Fredeking LC was only listed on the registration as the record owner at the time of the accident but was not the actual owner, the plaintiff immediately, within two (2) months of filing the Complaint, sought to

amend the Complaint to reflect the proper owner. (See, Plaintiff's Motion to Amend Complaint). The defendants state that "yet, in the Motion to Amend Complaint, Ms. Fredeking acknowledges that the law firm is the owner of the vehicle, but states that she is the proper owner." (See, Appellants' Brief, p. 8). Again, this is inaccurate as the Motion to Amend Complaint clearly reflects that Fredeking and Fredeking, LC was only on the registration. As noted in the Motion to Amend, "the title of the vehicle previously had been transferred to Arden E. Fredeking and/or R.R. Fredeking, II but had not been sent to the Department of Motor Vehicles to have a new titled issued." (See, Motion to Amend Complaint).

The defendants also rely heavily upon the fact that repair bills, the accident report, and post-accident documents reflect Fredeking and Fredeking, LC as the owner of the vehicle. (See, Appellants' Brief, p. 8). However, as with all of the confusion involving the ownership of the vehicle, these documents merely reflect what was contained on the registration and do not reflect actual ownership. In fact, Ruby Robateau, who stored the vehicle for the plaintiff, clearly testified that he merely used the registration to fill out the bills but knew that Arden was the actual owner. Specifically, when questioned why the repair bills reflect Fredeking and Fredeking, LC as the owner, Mr. Robateau testified that "well, I knew it was Ms. Fredeking, but the fact I was looking at that time on the registration card, I put Fredeking and Fredeking Legal Corporation, but I knew it was the young lady's car." (See, Trial Transcript, pp. 129-130).

The defendants continue to place much emphasis on the fact that the registration was renewed each year from 1998 through 2003 in the name of the law firm. However, as Mr. Fredeking clearly explained, he was merely returning the registration and paying the fees to have it renewed and did not think it was necessary to change the registration. (See, Trial Transcript at p. 112). In fact, the trial court recognized at that time that registration did not equate ownership. (Id. at p. 113).

Furthermore, it is clear that the court recognized during trial that the evidence of ownership was overwhelmingly in favor of the plaintiff. On discussing ownership during an objection, the court stated that "you better come up with something strong, because title was only evidence of ownership and it is not required and lists exceptions as to when it is—but it will remain open to that argument." (See, Trial Transcript, at p. 84). The fact that the court recognized that the evidence demonstrated Ms. Fredeking's ownership of the vehicle so early on in the trial, demonstrates that the court clearly did not abuse its discretion when it overturned the jury verdict. This is especially true in light of the fact that the jury was not instructed concerning what constitutes ownership in the face of an inaccurate title or registration.

After the close of the evidence, Ms. Fredeking moved for judgment as a matter of law, with respect to each issue of damages, as well as to ownership of the car. The basis for the Motion was the defendants' failure to produce any evidence to contest those issues. The defendant did not call one witness or put on any evidence, other than the Certificate of Title,

concerning these issues. The trial court denied that Motion. Likewise, Ms. Fredeking objected to the submission of an interrogatory to the jury concerning ownership and objected to instructing the jury concerning ownership. Again, the trial court denied the Motions. In the alternative, Ms. Fredeking requested that the trial court permit the jury to be instructed concerning what constitutes ownership, pursuant to West Virginia law. (See, Plaintiff's Jury Instruction No. 21, attached as Exhibit A). However, the trial court refused to give the instruction, and therefore, the only instruction read to the jury concerning ownership was drafted by the defendants. (See, Trial Transcript, pp. 282, 284).

The jury was instructed and counsel presented closing arguments. However, during the defendants' closing, counsel improperly instructed the jury that Florida law applied and continued to improperly instruct and misrepresent to the jury that Florida law was applicable. Counsel for the defendants made repeated incorrect representations to the jury that Florida law was applicable in this case and that Ms. Fredeking did not own the vehicle in question. (Id. at 297-307). The plaintiff objected to these misrepresentations and incorrect statements of law. (Id. at pp. 298-299, 304). After deliberation, the jury returned a verdict, finding that Ms. Fredeking did not own the car and awarded her no damages. At that time, Ms. Fredeking renewed her Motion for Judgment as a Matter of Law, or in the alternative, requested a new trial.

Following trial, Ms. Fredeking submitted a post trial motion requesting that the court grant her judgment as a matter of law, or in the alternative, award her a new trial. (See,

Plaintiff, Arden E. Fredeking's, Motion for Judgment as a Matter of Law or in the Alternative for a New Trial and Incorporated Memorandum of Law). The basis for Ms. Fredeking's Motion was that she was entitled to judgment as a matter of law, because there was no evidence presented to the jury, whatsoever, which indicated that she did not own the vehicle in question. In the alternative, Ms. Fredeking requested a new trial for the following reasons: (1) the jury's verdict was against the clear weight of evidence; (2) the trial court improperly instructed the jury concerning ownership of the vehicle over Ms. Fredeking's objections; and (3) the defendants made improper remarks during closing which substantially prejudiced Ms. Fredeking and confused the jury. (Id.) Furthermore, although each individual ground for a new trial was sufficient to grant Ms. Fredeking's Motion, she also requested that the court apply the cumulative error doctrine in the event the errors were not individually sufficient for a new trial. (Id.)

Ultimately, the trial court granted Ms. Fredeking's Motion, finding that the defendants presented no evidence that Ms. Fredeking did not own the vehicle and no reasonable juror could have properly found that she was not the owner. (See, Order Granting a New Trial). Furthermore, the trial court found that all the evidence at trial concerning the ownership of the vehicle indicated that the title was properly signed over to Ms. Fredeking from her father. (Id.) In addition, the trial court determined that the issue of ownership should have never been presented to the jury and that the instructions provided to the jury further confounded their confusion and caused prejudicial error. (Id.) This appeal follows.

III. RESPONSE TO ASSIGNMENTS OF ERROR

A. **The trial court correctly applied West Virginia law to the transfer of ownership of the motor vehicle from Fredeking and Fredeking, LC to Arden Fredeking, and if the trial court did commit error it was harmless error.**

B. **The trial court was well within its discretion by setting aside the jury verdict, as it was against the clear weight of evidence and the verdict was a miscarriage of justice.**

C. **The trial court properly determined that the clear weight of the evidence demonstrated that Arden Fredeking was the owner of the 1985 BMW 535i at the time of the accident.**

D. **The trial court did not abuse its discretion or usurp the province of the jury by determining that Arden Fredeking was the owner of the subject motor vehicle.**

IV. POINTS AND AUTHORITIES RELIED UPON

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V. LEGAL ANALYSIS

A. Standard of Review

1. Standard of review for granting a new trial

This Court has made clear that a trial judge's decision to grant a new trial pursuant to W.Va. R. Civ. P. 59 is not subject to appellate review unless the trial judge abuses his or her discretion. "A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the

verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." Morrison v. Sharma, 200 W. Va. 192, 194, 488 S.E. 2d 467, 469 (1997) (internal citations omitted).

While it is true that a new trial shall not be granted unless it is reasonably clear that prejudicial error crept into the record or that substantial justice has not been done, this Court has recognized that the trial judge is better able than an appellate court to decide whether the error affected the substantial rights of the party. Id. at p. 470 (internal citations omitted). "Thus, unless the trial judge abuses his or her discretion, this court will not disturb a trial judge's decision to grant a new trial on the basis that his or her error affected the substantial rights of the party." Id. In this case a new trial was granted for the following reasons: (1) the jury's verdict was against the clear weight of the evidence; (2) the trial court improperly instructed the jury concerning ownership of the vehicle over Ms. Fredeking's objections; and (3) the defendants made improper remarks during closing which substantially prejudiced the plaintiff and confused the jury. Although each individual grounds for a new trial was sufficient for granting the plaintiff a new trial, when combined, the errors clearly warrant a new trial pursuant to the cumulative error doctrine.

2. Standard of Review for Judgment as a Matter of Law

In reviewing a trial court's grant of a motion for judgment notwithstanding the verdict, the appellate court's task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on the grant of a motion for judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If, on review, the evidence is shown to be legally sufficient to sustain the verdict, it is the obligation of the appellate court to reverse the trial court and to order judgment for the appellant. The appellate court reviews the grant of a motion for judgment notwithstanding the verdict de novo. Its charge is to determine if, after review, the evidence is shown to be legally sufficient to sustain the verdict and, if so, then it is the appellate court's obligation to reverse the judgment and reinstate the verdict for appellant. Yourtree v. Hubbbard, 196 W.Va. 683, 687, 474 S.E.2d 614, 617 (1996) (internal citations omitted).

B. The trial court correctly applied West Virginia law to the transfer of ownership of the motor vehicle from Fredeking and Fredeking, LC to Arden Fredeking, and if the trial court did commit error it was harmless error.

The defendants argue that Florida law applies to the transfer of ownership from Fredeking and Fredeking, LC to Arden E. Fredeking. However, at least a portion of the elements necessary to transfer ownership, the signing of the title, occurred in West Virginia. The defendant spent a significant amount of time discussing the residency of the parties but

is incorrect in its assertions that Fredeking and Fredeking, LC was a Florida corporation and/or Florida law firm. (See, Appellants' Brief, p. 17-19). In fact, R.R. Fredeking, II specifically testified during trial that Fredeking and Fredeking, LC was a West Virginia corporation with its main office and principle place of business in Huntington, West Virginia. (See, Trial Transcript, p. 105.)

The defendants are correct in stating that under West Virginia choice of law principles, generally the law in the state where the contract is made and is to be performed governs the construction of the contract. Sy. Pt. 3, Howe v. Howe, 218 W. Va. 638, 625 S.E. 2d 716 (2005). In this case, the contract at issue is the transfer of ownership of the vehicle from Fredeking & Fredeking, LC to Ms. Fredeking. Thus, the transfer occurred in West Virginia, which is obvious as the Notary Public who witnessed the signature was a West Virginia Notary Public. (See, Certificate of Title, attached to Appellants' Brief, as Exhibit A).

Furthermore, although an examination of the respective parties' residency is not especially pertinent to this discussion, the defendants claim that both parties were Florida residents. However, during trial, R.R. Fredeking II testified that Fredeking & Fredeking, LC was a West Virginia corporation with its main office and principal place of business in Huntington, West Virginia. (See, Trial Transcript, p. 105). Additionally, although this point was not specifically addressed by the trial court, as it was not necessary, Ms. Fredeking, could have been a resident of both West Virginia and Florida under the doctrine of dual residency pursuant to Nelson v. Allstate Inden. Co., 202 W. Va. 298, 503 S.E. 2d 857 (1998).

Although the defendants recognized that the place where a contract is made governs that contract, they once again rely heavily upon the fact that the vehicle was registered and licensed in Florida from 1998-2003. (See, Appellants' Brief at p. 18). The subsequent renewal of the registration has no bearing whatsoever on where the transfer of ownership occurred. Fredeking and Fredeking, LC, was a West Virginia corporation who transferred the ownership of the vehicle to Ms. Fredeking in West Virginia. While Ms. Fredeking may have not realized full beneficial ownership until the car was delivered to her in Florida, the transfer clearly took place in West Virginia.

In support of its position that Florida law applies, the defendants use a hypothetical of an individual purchasing a vehicle in Texas, living in Texas, and driving the vehicle while living there, and later, when involved in an accident in West Virginia, requesting that West Virginia law apply to that transaction. (See, Appellants' Brief at p. 18-19). The defendants go further to state that "obviously, taking Ms. Fredeking's position to its logical conclusion would produce an absurd result unsupported by any significant legal argument whatsoever." (Id. at p. 19). While the situation presented by the defendants' hypothetical is indeed absurd, it is irrelevant to the present situation because, as outlined above, the transaction between Ms. Fredeking and Fredeking and Fredeking, LC involved a West Virginia corporation transferring its asset to an individual in the state of West Virginia and then delivering that asset to Florida. The factual scenario in this case is more akin to someone purchasing a vehicle from a West Virginia dealership and then having that vehicle delivered to them in Ohio. An absurd result

would be for an individual to assert that Ohio law applies to that transaction, which is precisely what the defendants are attempting to do.

Importantly, even if the trial court did incorrectly apply West Virginia law, such error was harmless, as the law in West Virginia and Florida regarding transfer of ownership is essentially the same. In fact, in outlining West Virginia's recognition of transfer of beneficial ownership, this Court relied upon two (2) Florida cases to determine that transfer of ownership can be achieved when there is: (1) a bona fide sell or transfer of title or interest; (2) delivery of the vehicle; and (2) delivery of the properly endorsed Certificate of Title. Castle v. Perry, 201 W.Va. 90, 461 S.E. 2d 760 (1997); Horne v. Vic Potamkin Chevrolet, Inc., 533 So. 2d 261 (Fla. 1988); Palmer v. R.S. Evans, Jacksonville, Inc., 81 So. 2d 635 (Fla. 1955). As such, if the trial court did commit error in applying West Virginia law, that error was harmless.

C. The trial court was well within its discretion by setting aside the jury verdict, as it was against the clear weight of evidence and the verdict was a miscarriage of justice.

1. The clear weight of the evidence supported the conclusion that the vehicle was owned by Arden Fredeking at the time of the accident.

In this case, as the trial court recognized, the overwhelming evidence at trial demonstrated that Ms. Fredeking was the true owner of the vehicle, despite the failure to properly register the vehicle in this State. Although the defendants have cited seventeen (17) alleged pieces of evidence to support its position that Ms. Fredeking did not own the vehicle,

all of these supposed pieces of evidence stem from Ms. Fredeking's failure to properly register the vehicle in her name. (See, Appellants' Brief, pp. 20-21). However, the defendants have failed to recognize that registration does not equal ownership.

Pursuant to both Florida and West Virginia law, transfer of ownership of a vehicle is accomplished if the following factors are present: (1) a bona fide sale, bona fide gift or transfer of title or interest; (2) delivery of the vehicle to the buyer or recipient's possession; and (3) delivery of the properly endorsed certificate of title to the buyer or recipient. Syl, pt. 2, State of West Virginia ex. Rel. Castle v. Perry, 201 W. Va. 90, 491 S.E. 2d 760 (1997) (citing Syl. pt. 2 Keyes v. Keyes, 182 W. Va. 802, 392 S.E. 2d 693, (1990)); In re: Coburn, 250 B.R. 401 (Md. Fla. 1999); Horne v. Vic Potamkin Chevrolet, Inc., 533 So. 2d 261 (Fla. 1988).

As outlined above, Ms. Fredeking's father clearly gave the car to her, executed the title indicating transfer of ownership to her, delivered the vehicle to her, and delivered the properly endorsed Certificate of Title to her.

The defendants point out that Ms. Fredeking did not obtain title to the vehicle in her name until after the accident in question. (See, Appellants' Brief, p. 22). However, as was clearly demonstrated during trial, the new title was obtained after the previous title was damaged while the new owner was working on the car, not in some attempt to fool the jury and the trial court, as suggested by the defendants. (See, Trial Transcript, p. 110-111).

The defendants also rely heavily on Ms. Fredeking's original Complaint and Motion to Amend, whereby it is indicated that the record owner of the vehicle was Fredeking & Fredeking, LC at the time of the accident. (See, Appellants' Brief, p. 23). However, Ms. Fredeking clearly stated that the ownership of the vehicle had been transferred to her, but the vehicle had not been registered with the Department of Motor Vehicles. (See, Motion to Amend). Again, the defendants are confusing registration with ownership.

Next, the defendants allege that because Ms. Fredeking was represented by Paul Biser, an attorney working with her father, that the law firm was aware that it owned the vehicle as it had alleged in the original Complaint. (See, Appellants' Brief, p. 23) Again, the defendants are clearly confused about the facts as they relate to this case. Neither Ms. Fredeking's attorney nor her father could possibly be employed by the Fredeking and Fredeking, LC, the company listed on the title and registration, as that corporation did not exist. Fredeking and Fredeking, LC did not exist at the time of the accident or at the time of filing the original Complaint, which is precisely why the Complaint was amended. As such, it was impossible for Fredeking and Fredeking, LC to have been the owner of Ms. Fredeking's car at the time of the accident.

Essentially, the defendants allege that because Ms. Fredeking failed to submit the title to the DMV and pay a small fee, she was not the rightful owner of the motor vehicle. Following the defendants' logic, the car was owned by no one, as the corporation, Fredeking & Fredeking, LC, was dissolved. The defendant admittedly caused the damage to the

vehicle, but is attempting to avoid paying for that damage through mis-application or misunderstanding of the applicable law. The trial court properly determined that the only evidence at trial concerning ownership, and not registration, was that the title was signed over to Ms. Fredeking, who took possession of the title and the vehicle prior to the motor vehicle accident in question. (See, Order Granting New Trial). Furthermore, the trial court recognized that the only evidence presented at trial indicated that both Ms. Fredeking and the previous owner of the vehicle intended for ownership to transfer and both parties to that transaction acted as such. (Id.) The trial court properly found that prejudicial error was committed, based upon the evidence at trial, as well as the instructions provided to the jury. (Id.)

Ms. Fredeking is entitled to a new trial in this case as the jury's verdict was against the clear weight of the evidence. As outlined above, there can be no doubt that the plaintiff was the sole owner of the 1985 BMW, which is the subject of this civil action. When Ms. Fredeking's father gave her the car he signed the title over to her, gave her possession of the executed title and gave her possession of the motor vehicle. Again, no contrary evidence was presented. Pursuant to Castle v. Perry, supra., these actions effectively transferred ownership of the vehicle from the corporation to Ms. Fredeking. Just because Ms. Fredeking never registered the motor vehicle in her own name has no bearing on the actual transfer of ownership. Therefore, the jury's finding that Ms. Fredeking did not own the car was clearly against the full weight of the evidence.

2. The trial court properly set aside the jury's verdict, as a failure to do so would have resulted in a miscarriage of justice based upon the manner in which the jury was instructed.

Despite the defendants' assertions that the plaintiff has not alleged that the jury verdict would result in a miscarriage of justice, that is clearly not the case. (See, Appellants' Brief, p. 15). As the trial court recognized, the improper instructions provided to the jury clearly caused confusion and resulted in a miscarriage of justice. (See, Motion Granting New Trial). However, the defendants have entirely failed to address both the plaintiff's and the trial court's concern over the manner in which the jury was instructed.

Ms. Fredeking is entitled to a new trial, as the trial court improperly instructed the jury concerning ownership of the motor vehicle. As an initial matter, Ms. Fredeking objected to the issue of ownership even being presented to the jury and requested the trial court direct a verdict on this issue. (See, Trial Transcript, p. 246). However, as that Motion was denied, and as outlined above, the defendants proffered a jury instruction which indicated that certificate of title alone may not be sufficient to transfer ownership. (Id. at p. 284). In return, as the trial court decided that the issue would go to the jury, Ms. Fredeking submitted a supplemental instruction which accurately described West Virginia law and was based upon Castle v. Perry, holding that transfer of title, delivery of the vehicle, and delivery of the properly endorsed certificate of title was sufficient to transfer ownership. (See, Jury

Instruction, Exh. A). The trial court, over Ms. Fredeking's objection, instructed the jury on the defendants' instruction, but refused to present the jury with Ms. Fredeking's instruction. Subsequently, the jury returned a verdict in favor of the defendants on that precise issue, ownership.

Although the defendants do not address the instruction provided to the jury during trial, one of the bases for the trial court granting Ms. Fredeking a new trial was that the jury was improperly instructed. This improper instruction in conjunction with the overwhelming evidence that Ms. Fredeking owned the vehicle necessitated the granting of a new trial. (See, Order Granting a New Trial).

As mentioned above, the issue concerning ownership should not have been presented to the jury in the first place, and therefore, the jury should not have been given the instruction proffered by the defendants concerning ownership. However, as the trial court chose to give the defendants' instruction, the jury should have also been presented with Ms. Fredeking's instruction, so that the jury was properly instructed on the entirety of the law. The trial court recognized this error.

A trial court should not refuse to give an instruction if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge given to the jury; and (3) it concerns an important point in the trial so that the failure to give it can seriously impair the party's ability to effectively present their case. Kessel v. Leavitt, 204 W. Va. 95, 122-123,

511 S.E. 2d 720, 770 (1998). Furthermore, jury instructions, when given as a whole, must be accurate and fair to both parties. Syl. Pt. 6, Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E. 2d 374 (1995).

The first factor, whether the instruction is a correct statement of law, was clearly met. Pursuant to Castle v. Perry, supra., one way in which to transfer ownership of a vehicle is to provide that vehicle as a gift, deliver the vehicle to the recipient's possession, and deliver a properly endorsed certificate of title to the recipient. This is precisely what occurred in this case and was reflected by the instruction requested by Ms. Fredeking, which the trial court refused.

Likewise, the second factor, whether the instruction was substantially covered in the remainder of the charge, is met. The only instruction concerning ownership was the one proffered by the defendants. The defendants' instruction that ownership of title may not be sufficient to transfer ownership, but that something more may be required, although, for the sake of argument, is accurate, would not fully cover Ms. Fredeking's instruction or West Virginia or Florida law. In fact, giving this instruction on its own, without Ms. Fredeking's instruction, obviously misled and confused the jury. The jury instruction that something, in addition to certificate of title, may be necessary to transfer ownership, without explaining what that "other evidence" was, is very misleading. The only evidence that the jury had concerning what else would be necessary to transfer ownership was the argument of defendants' counsel that the plaintiff was required to register the vehicle in her name pursuant to the laws

of the state of Florida. However, that argument was clearly improper, based on the trial court's ruling that West Virginia law applied. Regardless, defendants' counsel's arguments did not even accurately reflect Florida law as this Court analyzed in Castle v. Perry, supra.

The third factor, whether the instruction concerned an important point of the trial that seriously impaired Ms. Fredeking's ability to present her case, has also been met. It is clear that ownership was an important point in the trial, as the jury ruled in favor of the defendants on that issue, which effectively prohibited Ms. Fredeking from recovering. The fact that the trial court did not give the plaintiff's instruction clearly prejudiced her, as the jury most likely believed that she was required to register the vehicle in her name in Florida. However, as outlined above, that was not the case. Any rules or regulations of Florida should never have been presented to the jury in any manner whatsoever.

Furthermore, the failure to give Ms. Fredeking's instruction clearly impaired her ability to present the case, as she completed all the necessary steps in order to transfer ownership pursuant to Castle v. Perry, but yet was not permitted to instruct the jury that those steps were sufficient to transfer ownership. Subsequently, the jury determined that ownership had not been transferred, as they were not instructed on the proper law, despite the fact that Ms. Fredeking had completed those steps. Therefore, there can be no question that Ms. Fredeking was not able to demonstrate to the jury that ownership had been transferred, as they were not instructed on one of the possible avenues of transfer of ownership, the one by which Ms. Fredeking obtained ownership of her vehicle.

As the trial court recognized, this improper instruction on the law resulted in a miscarriage of justice and warranted a new trial. Again, although the defendants failed to address the trial court's instructions, the improper instructions clearly factored into the trial court's decision to grant a new trial. At a minimum, the overwhelming evidence and improper instruction demonstrate that the trial court did not abuse its discretion with respect to granting Ms. Fredeking a new trial.

The defendants point to several criminal code sections in Florida and West Virginia in an attempt to paint the plaintiff and her father in a bad light. (See, Appellants' Brief, p. 24). Those criminal code sections are entirely irrelevant to the case at hand. Moreover, as with the rest of the defendants' assertions which confuse ownership and registration, if Ms. Fredeking did not own the vehicle in question there was absolutely no requirement that she register it in any state. The basis for the defendants' entire arguments adhere to, and are thereby defeated by, this logic. If Ms. Fredeking owns the car she is required to register it, but because she did not register it she cannot own it. While there may be minimal statutory penalties for failure to register a vehicle, that penalty does not include losing all property rights in your vehicle.

3. Both West Virginia and Florida law support Arden Fredeking's ownership of the vehicle.

Next, the defendants point to Fla. Stat. Ann. § 319.22(1), which requires an individual to obtain a new Certificate of Title in that person's name to make the title marketable, to support their position that Ms. Fredeking did not own the car. As recognized in the case cited by the defendants, In re Coburn, 250 B.R. 401 (M.D. Fla. 1999), the owner of a motor vehicle can transfer his or her interest in the motor vehicle, in this case, Fredeking & Fredeking LC to Ms. Fredeking, without registering the vehicle, but then the transferee does not have marketable title. Marketable title does not necessarily equal ownership.

In fact, the second case cited by the defendants, Green Tree Acceptance Inc. v. Zimmerman, 611 So.2d 608 (Fla. 1993), explicitly states that a purchaser's failure to obtain the title certificate at the time of sale does not prevent the passage of title from the seller to the buyer and that Fla. Stat. Ann. "§ 319.22(1) does not provide that no valid title shall be perfected until the purchaser obtains a title certificate, but no *marketable* title should be perfected until that time." Id. at 610 (emphasis by court).

More importantly, as this Court has recognized, Florida recognizes that beneficial ownership of a vehicle can transfer in spite of the failure to comply with Fla. Stat. Ann. § 319.22(1). Castle v. Perry, 491 S.E. 2d at 763. Although Castle v. Perry dealt with relieving an automobile dealer of liability pursuant to West Virginia Code § 17A-4-9, it recognizes that

when strict requirements for registration pursuant to a statute are not followed, but that when a car is sold or transferred, the car and titled are delivered, and the parties express intention is to make the transfer immediate, then a transfer of beneficial ownership has been achieved. As such, examining the application of the registration statutes, for purposes of damages or ownership in this case, is unnecessary.

Furthermore, this reasoning is consistent with other West Virginia cases dealing with transfer of automobile ownership. As this Court has previously held, certificate of title is not conclusive proof of ownership. Keyes v. Keyes, 182 W.Va. 802, 804, 392 S.E. 2d 693, 695 (1990). In Keyes, an automobile was properly titled in the decedent's name and the decedent's estate was attempting to claim that it was property of the estate. However, the automobile was purchased by the decedent's mother and she held a lien on the automobile. Id. There was no evidence that the decedent's mother intended the car as a gift to the decedent. Id. The title arrangement designating the decedent as the owner was merely a ruse, as the decedent's mother could not obtain liability insurance on the car if it was in her own name. Id. This Court determined that the decedent's mother was the actual owner of the car, despite what the certificate of title indicated, as the evidence was overwhelming that the car in question actually belonged to the decedent's mother. Id.

In this case, all of the evidence, other than the registration, indicates that Ms. Fredeking owned the motor vehicle. More importantly, the registration is not even evidence of ownership. Therefore, Ms. Fredeking was the actual owner of the car. At a minimum,

beneficial ownership was transferred from Fredeking & Fredeking LC to Ms. Fredeking, and therefore, she was the owner of the car for purposes of this civil action. As such, the trial court's ruling was correct.

The defendants go on to assert that failure to comply with Fla. Stat. Ann. § 319.22(1) prohibits Ms. Fredeking from having any ownership rights or interests in the vehicle whatsoever and further prohibits this Court from recognizing any such ownership interest in the vehicle. (See, Appellants' Brief, p. 27). However, the case relied upon by the defendants, Green Tree Acceptance, Inc. v. Zimmerman, specifically held that failure to comply with § 319.22(1) does not prevent the passage of the title, but only holds that no marketable title shall be perfected until that section is complied with. 611 So. 2d at 610. The Florida court further went on to hold that the defendants, although they failed to comply with Fla. Stat. Ann. §319.22(1), did obtain title of the mobile home and did have a property interest, however, that property interest was subject to a lien which was properly filed by the plaintiff, Greentree. Id. Furthermore, the defendants have completely ignored the doctrine of beneficial ownership, which is clearly recognized by both the State of Florida and the State of West Virginia as outlined in Castle v. Perry.

To follow the defendants' rationale that Ms. Fredeking had no ownership interest in the subject vehicle would result in an impossible scenario. As outlined above, Fredeking & Fredeking, LC was dissolved some time ago. Therefore, if Ms. Fredeking does not have any ownership interest in the vehicle, then apparently no one does.

Furthermore, the defendants' position would result in an absurd result. This case can be analogized to an individual who owns a classic car which is not driven, but is kept in a garage and is not registered with any state department of motor vehicles. Suppose for some reason that individual has to use that vehicle in an emergency situation, or otherwise, and is involved in a motor vehicle accident, through no fault of their own. Although that vehicle was not properly registered with any state department of motor vehicles, the owner still has a property interest in the value of that vehicle and should be compensated accordingly, regardless of the lack of proper registration.

The defendants once again claim that Ms. Fredeking is violating the law because she drove a vehicle with a license plate registered to the law firm. (See, Appellants' Brief, at p. 25-26). This argument is entirely irrelevant to who owns the vehicle. The defendants allege that this is "another factor in showing that the vehicle was, at the time of the accident, owned by the law firm, and not Arden Fredeking and her father." (Id. at p. 26). Again, the law firm was non-existent at both the time of the accident, and at the time of filing the Complaint. It was impossible for the law firm to own the vehicle.

The defendants also try to deflect this Court's attention from the issues by stating that "interestingly, more than six (6) months after the accident, Ms. Fredeking found it necessary to obtain a certificate of title to the BMW putting the same into her name." (See, Appellants' Brief, p. 26). The defendants seem to suggest that Ms. Fredeking was somehow trying to

trick the Court or the jury into thinking that she properly titled the vehicle. The record is very clear on this point. After the defendants totaled Ms. Fredeking's vehicle it was sold at an auction. The buyer who purchased it from the auction house accidentally burnt the title which Ms. Fredeking had signed over to him. (See, Trial Transcript, p. 110). As such, Ms. Fredeking was required to obtain a new title to sign over to the purchaser. (Id.). These are the precise same tactics the defendants used at trial in confusing and misleading the jury.

Next, the defendants improperly allude that Ms. Fredeking did not transfer title to her name to avoid paying taxes. (See, Appellants' Brief, p. 27). Then, the defendants suggest that the title was not transferred on the date indicated. (Id.) The title is clearly executed by R.R. Fredeking, dated February 2, 1998, and notarized by Paul E. Biser, another attorney in the State of West Virginia. (See, Certificate of Title, attached to Appellant's Brief as Exhibit A). To even suggest that the date reflected on the title is inaccurate without any supporting evidence whatsoever is entirely improper.

There is no evidence to suggest that Mr. Fredeking did not execute the certificate of title on February 2, 1998, and transfer ownership to his daughter, Ms. Fredeking. The uncontroverted testimony established that Mr. Fredeking then delivered the motor vehicle and title to Ms. Fredeking. Likewise, it was clear that the parties' intent, and there is no evidence to the contrary, was that both Ms. Fredeking and Mr. Fredeking believed that she owned the vehicle and they both behaved in such a manner. These uncontested facts establish that Ms. Fredeking was the owner of the motor vehicle.

D. The trial court properly determined that the clear weight of the evidence demonstrated that Arden Fredeking was the owner of the 1985 BMW 535i at the time of the accident.

The defendants next assert that the trial court abused its discretion by setting aside the jury's verdict claiming there was conflicting evidence as to ownership. (See, Appellants' Brief, p. 28) Although this argument seems duplicative of Section C(1), as the defendants have addressed it again, the plaintiff will do the same. The defendants state that the record was "replete with sharply conflicting evidence regarding the issue of ownership." Id. Again, registration and marketable title do not equal ownership. Importantly, there is not one single party to the transaction and transfer of ownership that disputes that the true owner of the vehicle is Ms. Fredeking. The defendants are the only people that contest that Ms. Fredeking actually owns the vehicle, and only do so to avoid paying for the damages they caused to the vehicle.

The defendants go on to reiterate all the instances on which Ms. Fredeking did not register the vehicle in Florida in her name. However, the failure to do so does not void or otherwise revoke Ms. Fredeking's ownership of her vehicle, but instead potentially subjects her to a minimal fine or penalty.

Interestingly, the defendants once again fail to address beneficial ownership. More importantly, the defendants do not, and cannot, dispute that the elements necessary to

establish beneficial ownership were met in this case. The true undisputed facts, as they relate to *ownership* are that: 1) the vehicle was given as a gift to Ms. Fredeking and the title was executed and transferred to her; 2) the vehicle was delivered to her; and 3) the proper and/or certificate of title was given to her. Ms. Fredeking, the transferee, and Mr. Fredeking, the transferor, have testified under oath that they both intended for Ms. Fredeking to be the sole owner of the vehicle, and believed that proper transfer had occurred. In fact, Mr. Fredeking recognized that the transfer occurred but that to have marketable title, Ms. Fredeking would have needed to have obtain a new title. (See, Trial Transcript, p. 122). As he testified when questioned why his daughter did not get a new title, Mr. Fredeking stated "I don't know why she didn't do it. She didn't need it. It wasn't her concern. She had the car. She knew she had owned it. She had full use of it. She could have done anything she wanted with it. I guess until she decided to sell it, she wouldn't have had to do that." Id. Again, while marketable title, registration and licensing may be evidence of ownership, they are clearly not conclusive proof, and can be easily overcome when the circumstances dictate. Keys v. Keys, 182 W.Va. 802, 804.

E. The trial court did not abuse its discretion or usurp the province of the jury by determining that Arden Fredeking was the owner of the subject motor vehicle.

The defendants next argue that the trial court improperly substituted its judgment for that of the jury for the same reasons as argued in the other portions of the defendants' brief. (See, Appellants' Brief, p. 30-32). The trial court clearly has discretion in granting a new trial.

In fact, in this case, the trial court had to do that very thing to prevent a miscarriage of justice. The overwhelming evidence, as the trial court recognized early during the trial, was that Ms. Fredeking was the owner of the motor vehicle in question.

The defendants once again want to point to the lack of proper registration of the motor vehicle to establish ownership. (Id. at p. 31). The defendants claim that "the Plaintiff admitted that the law firm continued to renew the registration from 1998-2003, representing to all the world that it owned the vehicle, and this was all done with the Plaintiff's approval." (See, Appellants' Brief, p. 31). To reiterate one last time, there was no law firm. It had been dissolved prior to the transfer of ownership.

Likewise, once again, the defendants state that "the fact that the Complaint and the Motion to Amend Complaint alleging that the law firm owned the vehicle were both filed by an attorney with that very law firm cannot be understated." Id. Again, the only thing reflected in the Motion to Amend Complaint was that the plaintiff recognized that the non-existent law firm was incorrectly named on the registration but that Arden Fredeking was the true owner of the vehicle.

Furthermore, the defendants ask that this Court adopt the findings of the jury, but fail to address the fact that the jury was acting under a misapprehension of law based upon the improper jury instructions. As outlined above, the issue of ownership should have never even gone to a jury, but once it did, the trial court was required to properly instruct the jury

concerning what, besides title, could be evidence of ownership. Unfortunately, that was not done.

In this case, the trial court recognized that the clear weight of evidence presented during trial undoubtedly demonstrated that Ms. Fredeking owned the motor vehicle. (See, Order Granting New Trial) The trial court also correctly recognized that it erred by failing to properly instruct the jury concerning ownership, and corrected that mistake. Id. At a minimum, the trial court did not abuse its discretion by awarding a new trial. Furthermore, based on the established facts, the trial court was correct in finding that, as a matter of law, Ms. Fredeking owned the vehicle.

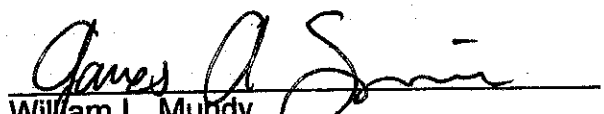
VI. RESPONSE TO PRAYER FOR RELIEF

The appelle respectfully requests that this Court uphold the ruling of the trial court granting the plaintiff a new trial and finding, as a matter of law, that Arden E. Fredeking owned the vehicle in question. In the alternative, at a minimum, the plaintiff requests that this Court uphold the trial court's ruling awarding a new trial, as the clear weight of evidence supported finding Ms. Fredeking owned the vehicle and as the improper jury instructions clearly caused prejudice and resulted in a miscarriage of justice.

ARDEN E. FREDEKING,

BY COUNSEL

PREPARED BY:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARLISE TYLER and BRADFORD TYLER
as parents and next friends of ARIANNA TYLER,
an infant under the age of eighteen (18) and
MARLISE TYLER and BRADFORD TYLER,
individually,

Appellants,

v. Appeal No. 073805

ARDEN E. FREDEKING, and
GEICO INDEMNITY COMPANY,

Appellees.

CERTIFICATE OF SERVICE

I, James A. Spenia, counsel for the petitioner, do hereby certify that I have served a true and exact copy of the foregoing **BRIEF OF APPELLEE, ARDEN E. FREDEKING** upon the following counsel of record via U.S. Mail, postage pre-paid, first class this 11th day of August, 2008.

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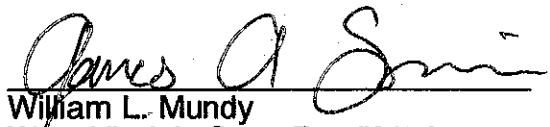

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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ARDEN E. FREDEKING,

Plaintiffs,

vs.

Civil Action No. 03-C-0811
Judge John L. Cummings

MARLISE TYLER AND BRADFORD TYLER
as parents and next friends of ARIANNA TYLER,
an infant under the age of eighteen (18) and
MARLISE TYLER AND BRADFORD TYLER,
individually, and GEICO INDEMNITY COMPANY,

Defendants.

PLAINTIFF'S PROPOSED JURY INSTRUCTION NUMBER 21

Transfer of ownership may be accomplished if the following factors are present: (1) a bona fide sale, bona fide gift or transfer of his title or interest; (2) delivery of the vehicle to the buyer or recipiant's possession; and (3) delivery of the properly endorsed certificate of title to the buyer or recipiant.

Syl. Pt. 2, State of West Virginia ex rel. Castle v. Perry, 201 W.Va. 90, 491 S.E.2d 760 (1997) (citing, Syl. Pt. 2, Keyes v. Keyes, 182 W.Va. 802, 392 S.E.2d 693 (1990)).

GIVEN

REFUSED

JUDGE

EXHIBIT

A